would seem satisfied by requiring a surrender of the preference as a condition to adjudication, but not to the right to petition;[18] for a distinction is apparently taken in both the present statute and that of 1867, between the *proof, i. e.*, the filing of a claim provable under § 63, and its *allowance.*[19]

RUNNING OF THE BURDEN OF COVENANTS WITH THE LAND AT LAW. — Where the burden of a covenant runs with the land and there is no contractual relation between the parties, they are bound, it is said, by "privity of estate." Just what constitutes privity of estate when both parties have not estates in the land, that is, when the relation of landlord and tenant does not exist, is a difficult question, owing to the confused state of the authorities.

Whatever may have been the early law,[1] the present general doctrine in England is, that privity of estate exists only where there is the relation of landlord and tenant.[2] If, however, the covenant can be construed as a grant of an easement or profit, the burden of the right so created will run.[3] Furthermore, the burden of a covenant to pay for damages incidentally caused by exercising a profit has been, in effect, allowed to run, on the theory that the substance of the right granted was to take, but pay.[4] In three jurisdictions in this country, the doctrine may be as closely limited as in England;[5] but most states, starting with the rule that an easement may be created by an instrument sounding in covenant,[6] have readily advanced to the position that further covenants in support of such an easement, which cannot from their subject matter constitute additional easements, bind the owner of the servient tenement.[7] So, the general rule in this country is that, in the absence of the relation of landlord and tenant, there is privity of estate if the interest of one party in the other's land is

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[18] *Re* Horntstein, 122 Fed. 266. *Cf.* Frederic L. Grant Shoe Co. *v.* W. M. Laird Co., 212 U. S. 445, 448.

[19] Under the Act of 1867, (14 Stat. at L. 517), see §§ 22, 23, 27, 29, 30, 33, 34. Under the Act of 1898 see §§ 57, 63. See also, in the English Bankruptcy Act (46 & 47 Vict. c. 52), Schedule II, § 22.

[1] See SIMS, COVENANTS, 58, 62.

[2] Haywood *v.* Brunswick, etc. Society, 8 Q. B. D. 403.

[3] Rowbotham *v.* Wilson, 8 H. L. C. 348.

[4] Aspden *v.* Seddon, 1 Ex. D. 496. A result like the running of the burden of a covenant to pay for a part of a party wall on using it, has been reached on an unsatisfactory theory of implied contract. Irving *v.* Turnbull, [1900] 2 Q. B. 129.

[5] Pittsburgh, C. & St. L. Ry. Co. *v.* Bosworth, 46 Oh. St. 81, but *cf.* Hickey *v.* Railway Company, 51 Oh. St. 40. See Tardy *v.* Creasy, 81 Va. 553; Brewer *v.* Marshall & Cheeseman, 19 N. J. Eq. 537. The actual decisions of the last two cases are not incompatible with the burden's running more freely. *Cf.* Costigan *v.* Pennsylvania R. R. Co., 54 N. J. L. 233.

[6] Conduitt *v.* Ross, 102 Ind. 166; Weill *v.* Baldwin, 64 Cal. 476.

[7] Fitch *v.* Johnson, 104 Ill. 111; Nye *v.* Hoyle, 120 N. Y. 195. The same result has been reached with covenants in aid of a profit. Morse *v.* Aldrich, 19 Pick. (Mass.) 449; Crawford *v.* Witherbee, 77 Wis. 419. Or a rent charge. Herbaugh *v.* Zentmyer, 2 Rawle (Pa.) 159; Van Rensselaer *v.* Hays, 19 N. Y. 68. But an equitable lien on the land, other than a mortgagor's interest (Barron *v.* Whiteside, 89 Md. 448), does not constitute privity of estate. Edwards *v.* Meader, 11 N. Y. Supp. 285; Fresno Land Co. *v.* Rowell, 80 Cal. 530.

an incorporeal hereditament. But this is commonly the limitation of the doctrine; [8] and to this extent there is, on the whole, unanimity.

The confusion arises in two ways. In the first place, privity of estate is frequently extended to include covenants imposing affirmative duties on the covenantor, as creating easements of a spurious nature.[9] And the courts, not unnaturally, have differed as to what covenants may properly come within this class.[10] In the second place, a few courts have added a new principle, that a covenant contained in an instrument conveying the fee [11] runs with the land, if such is the intent of the parties, and if the burden is one which, consistently with public policy,[12] can be imposed on the land. Thus it was recently held that where in a deed conveying the fee, the grantee, a railroad company, covenanted to build and maintain a station on the land granted, the grantee in fee of the covenantor was bound by the covenant. *Louisville, H. & St. L. Ry. Co.* v. *Baskett*, 121 S. W. 957 (Ky.).[13] This principle is preferable to that definition requiring always the existence of an incorporeal hereditament. In the first place, it has been pointed out that privity of estate formerly meant merely succession to the title of a party to the covenant.[14] And the historical basis for recognizing as easements obligations imposing active duties on the owner of the servient tenement is not entirely satisfactory: probably all the old cases can be explained as local customs.[15] It is submitted, moreover, that the doctrine of the main case is a simpler and more straightforward way of carrying out the intention of the parties, while at the same time avoiding the evils of unduly restricting the use and alienation of land,[16] or forcing an unexpected burden on an innocent purchaser. For by limiting [17] the doctrine to covenants in the deed passing the estate with which the burden is to run, the protection of the recording acts is secured.

IMPUTED NEGLIGENCE. — The law of imputed negligence is gradually crystallizing into two general rules. When A sues B, his recovery is barred by the contributory negligence of C (1) when the law identifies A with C,

[8] Hurd *v.* Curtis, 19 Pick. (Mass.) 459.

[9] Bronson *v.* Coffin, 108 Mass. 175.

[10] Compare Hurd *v.* Curtis, *supra*, with Horn *v.* Miller, 136 Pa. St. 640; and Wheeler *v.* Schad, 7 Nev. 204, with Farmers' Canal & Reservoir Co. *v.* New Hampshire Real Estate Co., 40 Colo. 467.

[11] The burden has been held not to run with the grant of an incorporeal hereditament. Barringer *v.* Virginia Trust Co., 132 N. C. 409. Obviously where the estate conveyed is less than a fee, there is the relation of landlord and tenant.

[12] The cases cited in note 16 are examples of the limitation imposed by public policy.

[13] The Georgia Southern Railroad *v.* Reeves, 64 Ga. 492, *accord.* See Sexauer *v.* Wilson, 136 Ia. 357; Conduitt *v.* Ross, *supra.*

[14] HOLMES, COMMON LAW, 404; SIMS, COVENANTS, 69. See Norcross *v.* James, 140 Mass. 188.

[15] See Tenant *v.* Goldwin, Ld. Raym. 1089. *Cf.* Yielding *v.* Fay, Cro. Eliz. 569; Lawrence *v.* Jenkins, L. R. 8 Q. B. 274; Inhabitants of Middlefield *v.* Church Mills Knitting Co., 160 Mass. 267, may be explained as creating a charge on the land, rather than an active duty.

[16] For example, by holding that the covenant does not "touch or concern" the land, Costigan *v.* Pennsylvania R. R. Co., *supra;* or is in restraint of trade, Tardy *v.* Creasy, *supra;* or hampers alienation, Haeussler *v.* Missouri Iron Co., 110 Mo. 188.

[17] Wheeler *v.* Schad, *supra. Contra,* Robbins *v.* Webb, 68 Ala. 393.